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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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ORIGINAL

No. 86-1306

In the

Supreme Court of the United States

[redacted]

[redacted]
Petitioner,

[redacted]
Respondent.

[redacted] a Petition for a Writ of Certiorari
[redacted] The Appellate Court of Illinois,
[redacted] Judicial District.

[redacted] IN OPPOSITION TO CERTIORARI

[redacted]
Public Defender of Cook County
[redacted]
[redacted]
(312) [redacted]

[redacted]

QUESTION PRESENTED FOR REVIEW

Whether the state trial and reviewing courts, viewing all the evidence surrounding defendant's custodial statements, properly found coercive police conduct rendering involuntary those statements made after defendant's clothing was seized.

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No. 86-1306

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ILLINOIS,

Petitioner,

vs.

CARY WISEMAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

OPINION BELOW

The state reviewing court disposed of petitioner's appeal in an unpublished* order pursuant to Illinois Supreme Court Rule 23. Ill.Rev. Stat., 1985, Ch. 110A, Sec. 23. Rule 23 states, in applicable part, that orders, as opposed to published opinions, are not precedential. The State court's unpublished Rule 23 Order is photographically reproduced in Appendix A to this brief for respondent.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition. As set forth in the argument that follows, however, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the petition so that the state court order may be reviewed.

* Petitioner incorrectly states the order was a published opinion. (Pet. p. 2)

STATEMENT OF THE CASE

Respondent Cary Wiseman was charged with murder. The hearing on his motion to suppress various statements made during eight hours of questioning revealed the following scenario:

On February 25, 1985 Cook County Police Officer William McHenery received a radio message that "Cary" had a body at 9604 Bianco Terrace in Des Plaines. (R. 8) Arriving at the door, the officer heard "sobbings and crying" inside apartment 1B. (R. 9) He pushed the front door open and found defendant Cary Wiseman on his knees in the fetal position (R. 41), sobbing, hugging the mutilated body with his right arm. (R. 10,41) The telephone was still in his left hand. (R. 10)

Cary was hysterical. (R. 13) It took two police officers to handcuff him and pry him loose from the deceased. (R. 45-46) When the officers removed him, still struggling, to the vestibule, he dropped to the floor and appeared to pass out. (R. 28) Officer Janosz called an ambulance for Cary because of his emotional state (R. 63), and two officers "literally" had to carry him, still handcuffed to the ambulance. (R. 72) He kept trying to run back "towards the body." (R. 30, 48) During the ambulance ride to Lutheran General Hospital, Cary was "ebbing in the state of emotions, going--crying and screaming, and then he would come (sic) back down and be somewhat talkative." (R. 73)

On orders of hospital personnel, the handcuffs were removed (R. 75), but Officer Carter, who had accompanied defendant in the ambulance, never let him out of his sight. (R. 75) When the officer asked Cary questions to establish his reason for being with the deceased, Cary announced he was going to get even with John (R. 75), decedent's ex (?) husband. (R. 91) (Elsewhere in the record it appears the deceased was Cary's girlfriend.)

At the hospital, Cary exhibited mood swings sufficiently bizarre to warrant the investigator's request for a blood and urine sample to test for drugs and alcohol. (R. 341, 343) Cary acquiesced, and specimens were taken, showing him to have been intoxicated. (Supp. R. 4) He was released to the investigator and transported to the Skokie

Police Station. The discharge diagnosis was a situational reaction with depression. (Supp. R. 4) At this time, the officers believed Cary was merely an upset witness.

At 2:00 a.m. Cary was placed in a small, windowless room at the Skokie Police Station. (R. 345, 162) As he was repeating to Inv. Allison how he hitchhiked to the crime scene (R. 126-127, 346), Officer Carter interrupted the dialogue to report that Cary had told a different story in the ambulance: Jerry had driven him there. (R. 125, 346) Investigator Allison cried out, "Who in the hell is Jerry?" and Cary "More or less went white in the face." (R. 346) According to the investigator's testimony, he knew then that Cary was "a killer." (R. 347, 377-379, 432)

> "It was the look on his face that hit me right between the eyes" (R. 379)

The officer immediately placed defendant under arrest. (R. 347) "Jerry" turned out to be Jerry Johanna, a man with whom Cary, using the alias "Steve", had apparently been having a clandestine homosexual relationship. (R. 356-358)

The investigator read defendant Miranda rights (R. 347) and questioned him about Jerry. Defendant, however, did not respond. (R. 347) During the next half-hour (2:30-3:00 a.m.) defendant's clothing was seized for evidence, leaving him in his underwear for 30-45 minutes until someone brought a hospital gown for him. (R. 202, 352, 353,440) During this time, police officers and evidence technicians took his fingerprints, palm prints and nail scrapings. (R. 349, 351) The door was open and the disrobed defendant was visible to persons in the outer office. (R. 151) During this time at least eight officers were in the outer office, including Officer Tischouser, a woman. (R. 349-350) Four of these officers also entered the inner office but denied questioning defendant while he was disrobed. (R. 319, 320, 382, 383)

Inv. Allison had a final conversation with defendant between 4:00 and 6:00 a.m. (R. 354, 388), after defendant had covered up with

"hospital garb". The investigator told defendant he had no doubt he (defendant) was the killer. (R. 360)

> "I told him why I thought he killed her. I explained my theory, my scenario as to what happened." (R. 360)

He also told him it was in his best interest to confess. (R. 360)

Although Inv. Allison testified he "wanted him to confess" (R. 359), the officer did not get the confession he wanted. Defendant maintained his innocence throughout. (Supp. R. 11, 13) Between 4:00 and 6:00 a.m. he was interviewed "on and off" by both Investigators Allison and Harris. (R. 354) According to Inv. Allison, Harris was in and out of the room repeatedly, but Allison was unable to say whether it was more or less than 5 times. (R. 392) Allison himself was in and out as well. (R. 354) Between 6:00 and 8:00 Inv. Smith had three or four separate conversations with defendant. (R. 196) During this time, "he was cogenial, he was hostile, he was sobbing, he was remorseful." (R. 237) Inv. Jones also spoke to defendant between 6:00 and 7:30 a.m. (R. 153) When defendant asked to phone his wife, Jones testified a call was not provided. (R. 153) Allison admitted defendant was "put off" from calling until interrogation was finished. (R. 352) The trial court characterized this phase of interrogation as interviews "by a series of police officers [and] state's attorneys, who at whim and fancy went in, went out, and went in. (R. 444)

The product of interrogation was fragments of circumstancial evidence without which the State has claimed its prosecution will be "substantially impaired." (R. 516) The trial court suppressed these statements, however, finding the investigation which produced them "repulsive" to the Fifth Amendment:

> "Taking all of the factors into consideration, the length of time which various officers entered and left and entered and left; the fact that none of them could testify that the defendant was ever fed; taking into consideration that he was kept in a room without any opportunity whatsoever to sleep, to relax, that at best he could have done was to sit on a chair from approximately 2:00 o'clock in the morning until 10:00 o'clock in the morning; the fact that for at least a half hour to forty-five minutes, the only clothes he had on was underwear.

> All these factors indicate to me, and the Court does find that the period of the interrogation was, in fact, so repulsive to the Fourth (Sic) or the Fifth Amendment, that it rendered any statements made by the defendant subsequent to the Evidence Technicians removing his clothing to be involuntarily made because of a coercive atmosphere in the interrogation room. (R. 447-448)

The State appealed from this ruling, and the Appellate Court of Illinois affirmed in an unpublished Order.

> During the third phase [of questioning] defendant's clothing had been taken from him, he had not an opportunity to rest, he had been repeatedly questioned by a number of law enforcement officials, and he had not eaten. The trial court found that the atmosphere in the interrogation room was so coercive that defendant's will was overborne, that he was "put off" from communicating with family members who may have obtained counsel, and that his inculpatory statement was in fact involuntary. From our review of the record, we cannot conclude that the decision of the trial court was manifestly erroneous. (Rule 23 Order, p. 7)

The Illinois Supreme court denied leave to appeal.

REASONS FOR DENYING THE WRIT

THE STATE COURTS CORRECTLY APPLIED THE LAW TO THE FACTS OF THIS CASE, AND NO QUESTION OF LAW IS RAISED BY PETITIONER.

Petitioner's only contention is that this case was wrongly decided on the facts. Toward this end, petitioner asserts the record shows no coercive police activity. (Pet., p. 21ff) Two state courts found otherwise.

During a week long hearing on defendant's motion to suppress, the court heard evidence from six police officers, two prosecutors and defendant's wife. In a detailed analysis of the evidence and applicable state law, the court explicitely found both defendant's mental state and his intoxication insufficient in and of themselves to render his statements involuntary. (R. 436-440) He then found defendant's intoxication and distraught mental condition even in combination, insufficient. (R. 442) Only in what was characterized as the third phase of questioning, after defendant's clothing had been seized as evidence, did the court find police activity sufficiently coercive to render any statements involuntary.

Based upon the totality of circumstances (R. 447-448), the court found this third phase of questioning "repulsive" to the fifth and fourteenth amendments. Measured against the background of defendant's mental condition and intoxication, this "totality" includes the following factors:

> 1. Seizure of defendant's clothing, leaving him exposed in his undergarments to at least eight officers, including one woman. (R. 351, 382, 151)
>
> 2. Exposure to several investigative procedures while disrobed (fingernail scrapings, fingerprinting and palmprinting) involving a minimum of four police officers. (R. 319, 320, 382, 383)*
>
> 3. Six to seven hours of relentless interrogation by relays of police officers and State's Attorney's (R. 354, 392, 196) "who at whim and fancy went in, went out, and went in" (R. 444), after defendant had covered up with "ill-fitting hospital garb and some sandals". (R. 440)
>
> 4. Eight hours (2 a.m. to 10 a.m.) in a small, windowless room on a hard-backed chair,

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* The State's petition erroneously claims "defendant was left completely alone in an office during that period." (Pet. p. 27-28)

without food and without opportunity to lie down. (R. 445)

5. Refusal, after defendant's request, to permit a phone call to his wife, until questioning had been completed. (R. 153) (Referred to by the reviewing court but not the trial court in its specific findings.)

Although the State's petition charges the trial court failed to consider "the totality of the circumstances" (Pet. p. 23), this claim is not supported by the record, which demonstrates particularly careful discussion of this totality, against the background of defendant's distraught mental state and intoxication. (R. 448-448) The result of the court's carefully and explicitely "taking all of the factors into consideration" (R. 447) was suppression of only those statements made after defendant's clothing was seized.

The State's petition additionally claims (as it previously claimed in the State reviewing court) the trial court relied on facts not supported by the record. (Pet. p. 23) This charge is unsupported by any specific examples, and is inaccurate. Each finding was amply supported by the record. The only finding petitioner challenged as inaccurate below was lack of food. (St. brief on appeal, p. 12-13) One officer claimed "numerous officers" offered defendant food but could not name which ones and could not say whether he had done so himself. (R. 327) Another claimed to have brought defendant a doughnut at 8:30 a.m. (R. 194), but a prosecutor present at the time was not able to corroborate the officer's testimony. (R. 293) Thus, nowhere in the record was the court's finding contradicted: "None of [the officers] could testify that the defendant was ever fed." (R. 447)

Petitioner tries to frame an argument within the confines of Colorado v. Connelly (Dec. 10, 1986), 55 L.W. 4043. (Pet. p. 21, 28, 30) This effort fails for two reasons. First, there is no evidence in the record the trial court used a "clear and convincing" standard of proof rather than the preponderance of the evidence.

Second, and more important, unlike Connelly, the trial court did not base its "involuntariness" finding on defendant's mental condition

alone. On the contrary, where the only aberrent factor was defendant's mental state, the trial court explicitely cited state law holding this factor inadequate, in and of itself, to render a statement involuntary. (R. 440) Only where coercive police conduct exploited this weakness with seizure of defendant's clothing, his subjection, while disrobed, to physical investigative procedures carried out by a minimum of four officers, followed by six to seven hours of interrogation on a hard-backed chair in a small, windowless room by relays of officers who, in the court's words "at whim and fancy went in, went out, and went in," all while defendant was covered only with hospital garb, did the court find the totality of circumstances supported a finding that the confession was involuntary. Blackburn v. Alabama (1960), 361 U.S. 199. Nowhere does Connelly state defendant's mental state is irrelevant to a finding of involuntariness. On the contrary, Connelly reaffirms this Court's prior holdings that mental condition is "surely relevant to an individual's susceptibility to police coercion." Connelly, p. 4045. The trial court in the present case made precisely such a finding when it ruled the "period of interrogation ... repulsive to the Fifth Amendment" and suppressed as involuntary only those statements made after defendant's clothing was seized.

Finally, petitioner relies (as it did below) on People v. Jackson (1966), 35 Ill.2d 162, 220 N.E.2d 229 in support of its argument that removal of one's clothing is "simply a factor to be considered" in the totality of circumstances. The Jackson court stated, in dicta, that removal of defendant's clothing during questioning is a "highly significant factor to be considered in determining the voluntariness of his confession." Jackson, p. 223. Though petitioner apparently finds it persuasive that the order to Jackson to drop his pants was not the only factor considered by the Jackson court (Pet. p. 33), neither was it the only factor considered by the trial court in the present case. In fact, the trial court found the circumstances of this case demonstrably more coercive than those of Jackson: in addition to the six to seven hours of interrogation in relays, fatigue, and absence of food, defendant was not just asked to "drop his pants at some

unspecified time and immediately allowed to pull them up again. His clothing was seized, leaving him disrobed for 30-45 minutes. (R. 447)

Under state law, the trial court's findings will not be disturbed on review unless contrary to the manifest weight of the evidence. People v. Clay (1973), 55 Ill. 2d 501, 505. The trial court, having observed the witnesses while testifying, is in the best position to evaluate their testimony. People v. Carpenter (1976), 38 Ill. App. 3d 435, 347 N.E.2d 781. The state appellate court reviewed the record and affirmed:

> During the third phase [of questioning] defendant's clothing had been taken from him, he had not an opportunity to rest, he had been repeatedly questioned by a number of law enforcement officials, and he had not eaten. The trial court found that the atmosphere in the interrogation room was so coercive that defendant's will was overborne, that he was "put off" from communicating with family members who may have obtained counsel, and that his inculpatory statement was in fact involuntary. From our review of the record, we cannot conclude that the decision of the trial court was manifestly erroneous. (Slip Op. p. 7)

This Court traditionally has not granted certiorari to State reviewing courts merely to review the factual correctness of state court decisions. Watts v. Indiana (1949), 338 U.S. 49, 50 n. 1; 93 L.Ed. 1801. Petitioner raises no important question of law -- indeed, no question of law at all. Its only contention is that two state courts found coercion where there was none, and thereby reached an "incorrect and gravely unjust result." (Pet. p. 24) Resolution of such factual matters should be left to the states and certiorari denied.

CONCLUSION

For the reasons stated herein, respondent Cary Wiseman respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

PAUL P. BIEBEL, JR.
Public Defender of Cook County
403 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-6350

Counsel for Respondent,

ALISON EDWARDS*
Assistant Public Defender
403 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-6350

*Counsel of Record.

A P P E N D I X A

FIFTH DIVISION
SEPTEMBER 12, 1986

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

85-3141

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
vs.	)	
	)	
CARY WAYNE WISEMAN,	)	Honorable
	)	Gerald Rohrer
Defendant-Appellee.	)	Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Defendant, Cary Wayne Wiseman, was indicted for murder. (Ill. Rev. Stat. 1983, ch. par. 9-1(a)(1).) He filed a motion to suppress statements which was granted after an evidentiary hearing. The State now appeals and contends that defendant voluntarily confessed to the crime and that the trial court improperly suppressed his statements.

The testimony of Officers William McHenery, Gerald Janosz and David Carter was substantially similar. Officer McHenery testified that at 11:0 p.m. on February 25, 1985, he received a radio report that a person identified as "Cary" had a body at 9604 Bianco Terrace in Maine Township. Officer McHenery arrived at the apartment simultaneously with Officer Janosz. "Sobbing sounds" emanated from an open first-floor apartment. The officers pushed the door and observed defendant kneeling over the

multilated body of a female. Defendant held the body with his right hand and the telephone in his left hand. The officers asked him to stand but he did not respond. After a struggle, Officers McHenery, Janosz and Carter, who had arrived on the scene, pulled defendant from the body. Defendant, who was hysterical, fought the officers, mumbled "I'm going to get even with John," and fell into an apparent faint. An ambulance arrived and transported defendant to the hospital.

Officer Janosz added that the victim's throat had been cut, and that there was a knife in the center of the body. He also stated that defendant cried, "Faith didn't deserve this," and that defendant appeared to be consoling the corpse. After the officers restrained defendant and removed him from the crime scene, they searched the apartment to determine if anyone else was there.

According to Officer Carter, defendant cried, screamed, became voluble then quiet. The officers asked his name, why he was at the apartment, how he got there and who the victim was. Defendant identified the victim as "Faith" and told Officer Carter how he arrived there. When the ambulance arrived to transport defendant to the hospital, he refused to walk. After defendant was treated at the hospital, at 2 a.m. he was transported to the police station by Investigator Allison. Fifteen minutes later the investigator questioned defendant about how he arrived at the crime scene. Defendant's statement was different than what he had told Officer Carter, who interrupted defendant and told the investigator what defendant had previously said. Investigator Allison then advised defendant of the Miranda warnings which defendant said he understood. Defendant did not ask for an attorney.

Officer Ronald Jones testified that during the early morning hours after the crime he reported to the crime scene and interviewed residents of the building. Next, he spoke to the defendant's wife, the victim's parents and defendant's friend, Jerry Johanna. According to Jones, defendant did not ask to speak to a lawyer, but asked for his wife and mother when the officer spoke to him at 6 a.m. At that time Investigator Allison told the officer that defendant used the name "Steve" during a homosexual relationship and that Johanna knew defendant as "Steve." The officer also stated that defendant's wife advised him that she had offered to drive defendant to the victim's apartment, but he declined and said he "didn't like her dropping him at places where he was staying."

Officer T.R. Smith testified that at midnight on February 25, 1985, he went to the crime scene then to the hospital where he spoke to Investigator Allison who said that defendant had been experiencing "severe mood changes" of hostility, friendliness, congeniality, offensiveness and remorsefulness. Investigator Allison described defendant as schizophrenic. At 6 a.m. Officer Smith interviewed defendant at the police station after determining he had been advised of his Miranda rights. Defendant related what had occurred the previous night and spoke with other officers and an assistant State's Attorney. He asked to speak to his wife and mother, but did not ask for an attorney. Defendant spoke to his wife at 7:30 a.m. and by telephone to his mother in Florida.

Assistant State's Attorney Dennis Wolter testified that at 10:15 a.m. on February 26, 1985, he interviewed defendant in the presence of assistant State's Attorney Bruno and Investigator Kenneth Harris. Attorney Wolter advised defendant of the Miranda rights and identified himself. Defendant

answered coherently, but acted as though he did not want to be interviewed. Attorney Wolter stopped the interview after five minutes. Defendant did not ask for an attorney and was neither abused nor threatened.

Assistant State's Attorney Bruno testified that at 7:50 a.m. on February 26, 1985, he interviewed defendant with Investigator Harris. The attorney advised defendant of the Miranda rights and that he was a suspect. Defendant agreed to be interviewed and was questioned for 30 minutes. He was coherent and did not manifest a split personality. Bruno had not been told that defendant was schizophrenic, but had been informed that defendant used the name "Steve" during homosexual relationships.

Investigator Kenneth Harris testified that he interviewed defendant at 2:30 a.m. on February 26, 1985, but noted nothing unusual about him and had no problems communicating with him. Defendant's request for cigarettes was granted and his wife brought him a change of clothes before the assistant State's Attorneys interviewed him.

Investigator Larry Allison testified that prior to interviewing defendant, Officer Carter advised him that defendant resented the police, had to be physically removed from the body and had referred to "John" as a suspect. When the investigator interviewed defendant, the latter was garrulous and provided personal information without questioning. After the investigator identified himself and his purpose, and although he was not yet a suspect, defendant became emotional, uncooperative, and friendly. He showed the investigator an abrasion above his belt which he claimed was caused by a police officer. Investigator Allison thought that defendant was under the influence of drugs or alcohol. According to the investigator, defendant had told a doctor at the hospital that he had

planned to kill "John for what he had done to Faith." The investigator then transported defendant to the station to prevent him from pursuing "John."

When defendant told Investigator Allison how he had arrived at the crime scene, Officer Carter interrupted and said that defendant previously said that Jerry Johanna had brought him there. Defendant became "white" and Investigator Allison, believing him to be the murderer, advised him of the Miranda warnings. When defendant refused to discuss Johanna, the questioning ceased. Defendant's clothing and fingerprints had been taken and the investigator returned at 3:30 a.m.

Although defendant asked to speak with his mother and wife, he was "put off" until the interview was completed. Investigator Allison told defendant that he believed he had murdered the victim.

Kim Wiseman, defendant's wife, testified that at 3:15 a.m. on February 26, 1985, two policemen came to her residence. At 10 a.m. Wiseman telephoned the police station and talked to defendant who denied that he had committed the murder and asked Wiseman to come to the station. When Wiseman arrived there defendant wore white baggy pants and a sweat shirt. He looked "tired," "distraught," "teary eyed" and "a mess, a wreck." He denied that he had committed the crime and cried. Wiseman stated that although she was married to defendant, he lived with other women and that on February 25, 1985, she had driven him to a tavern.

A stipulation was entered that if Dr. Bisek testified he would state that when he examined defendant during the early morning hours of February 26, 1985, defendant had 124 milligrams per deciliter of alcohol in his blood and was diagnosed as suffering a situational reaction with

depression.

We shall now consider determining whether it was improper for the trial court to conclude that defendant's statement was involuntary. The trial court's finding on the voluntariness of a confession will not be disturbed on review unless it is against the manifest weight of the evi- dence. People v. Underwood (1982), 108 Ill. 2d 846, 439 N.E.2d 1080.) Th State bears a heavy burden of establishing that a statement was intelligently and voluntarily made. (People v. Kincaid (1981), 87 Ill. 2d 107, 429 N.E.2d 508.) When an accused makes a statement to law enforcemen officials in circumstances which dictate that the former's will was overborne, or the statement was not a product of a rational intellect, tha statement is involuntary and thus inadmissible at trial. (People v. Hernandez (1982), 105 Ill. App. 3d 501, 434 N.E.2d 532.) This does not mean only that statements induced by physical coercion or promises of leniency or immunity are involuntary. Consideration is to be given to the details of the interrogation and the characteristics of the accused. People v. Sickley (1983), 114 Ill. App. 3d 167, 448 N.E.2d 612.

Upon entering its decision, herein, the trial court determined that defendant's statements were divided into three phases, i.e., those made at the crime scene commencing at 10 p.m., those made upon his arrival at the police station at 2 a.m. where he had been taken for his protection and that of others, and those made after his clothing had been taken after 3 a.m. The court concluded that statements made during the first phase were voluntary and for informational purposes in solving the crime. There was no requirement that he be advised of the Miranda rights, his detention was for his protection and that of others, and the information sought was to

assist in the apprehension of "John." The statements made during the second phase, the trial court concluded, were also voluntary and were part of the continuing investigatory process. That phase ended when Officer Carter advised Investigator Allison that defendant had previously provided a different version of how he had arrived at the victim's apartment. Then defendant became a suspect and the investigator advised him of the Miranda warnings.

During the third phase, defendant's clothing had been taken from him, he had not had an opportunity to rest, he had been repeatedly questioned b a number of law enforcement officials, and he had not eaten. The trial court found that the atmosphere in the interrogation room was so coercive that defendant's will was overborne, that he was "put off" from communicating with family members who may have obtained counsel, and that his inculpatory statement was in fact involuntary. From our review of the record, we cannot conclude that the decision of the trial court was manifestly erroneous.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

SULLIVAN, P.J., PINCHAM and LORENZ, JJ., concur.